

SABAH TOURISM PROMOTION CORPORATION

v.

KINAH CIRIJAYA SDN. BHD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

TUAN TEE AH SING JC

[CIVIL APPEAL NO. K11-09 OF 1994]

5 DECEMBER 1994

PRACTICE & PROCEDURE: *Application to strike out statement of defence and counterclaim - Whether plain and obvious case - Whether statement of defence scandalous, frivolous or vexatious - Whether statement of defence an abuse of the process of the Court - Whether there were any triable issues - Appeal against decision of lower Court dismissing application.*

The appellant/plaintiff appealed against the decision of the learned Magistrate to dismiss their application to strike out the defence and counterclaim of the respondent/defendant. By its statement of claim the appellant/plaintiff alleged that the respondent/defendant had undertaken to settle a debt on behalf of another. The respondent/defendant made part payment and refused to settle the balance.

The respondent/defendant argued that there was failure of consideration for the promise in that the appellant/plaintiff had failed to discontinue the suit against the other in return for the undertaking and further argued that here was a dispute as to the amount that had actually been paid to the appellant/plaintiff. The question that arose was whether there were any triable issues.

Held:

[1] The learned Magistrate was right in holding that whether or not there was consideration given by the appellant for the respondent's undertaking to pay the debt of another is a triable issue. The issue as to whether there is an implied term or condition attached to the undertaking that the summons should be discontinued raises a triable issue.

[2] It is clear that 6 different cheques were involved and six different receipts were given by both the appellant and the former solicitors of the appellant. In the circumstances the actual number of payments made is a triable issue as the appellant's contention is that there were four payments made whereas the respondent's contention is that there were six payments made.

[3] By the words "frivolous and vexatious" are meant cases which are obviously frivolous or vexatious or obviously unsustainable. The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the Court. In the circumstances of this case, the Magistrate was correct in deciding that this is not a plain and obvious case for striking out the statement of defence and counterclaim as on the pleadings and on the affidavits filed there are undoubtedly triable issues both of fact and of law.

[Appeal dismissed with costs].

Cases referred to:

National Company for Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 2 MLJ 300 (*refd*)

Lee Nyoon Choi v. Voon Noon [1979] 2 MLJ 28 (*refd*)

Attorney General of Duchy of Lancaster v. L. & New Rly [1892] 3CH 278 (*refd*)

Young v. Holloway [1895] P87(*refd*)

a Legislation referred to:

Subordinate Courts Rules 1980, O. 8 rr. 1(c) & 2, O. 14 r. 21(1)(b)(c) & (d)

For the appellant - Sa'adah A. Aziz; M/s. Lee & Aziz.

For the respondent - Peter Lee; M/s Lee & Associates.

JUDGMENT**b Tee Ah Sing JC:**

This is an appeal against the decision of the learned Magistrate dismissing the appellant's/plaintiff's notice of application under O. 14 r. 21(1)(b)(c) and (d) of the Subordinate Courts Rules 1980 with costs.

c In the said application the appellant/plaintiff prayed for an order that the statement of defence and counterclaim be struck out on the grounds that they are scandalous, frivolous or vexatious or it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the Court and leave of Court was not obtained to file the counterclaim in accordance with the provisions of O. 8 r. (1)(c) and that final judgment be entered against the respondent/defendant and costs of the application to be borne by the respondent/defendant.

d In the statement of claim the appellant/plaintiff aver that by letter dated 17 March 1989 (Exhibit "1BC2") addressed to the former solicitor of the appellant/plaintiff, Mr. Richard Malanjum of Messrs. Richard Malanjum & Co. the defendant company/respondent undertook to settle on behalf of one Datuk Harris bin Mohd. Salleh, the sum claimed by the appellant/plaintiff *vide* summons No: 26 of 1989 filed in the Sessions Court at Kota Kinabalu Sabah in the total amount of RM31,340.93 by way of monthly instalments. Pursuant thereto the defendant company/respondent remitted to the appellant/plaintiff *vide* the said Messrs. Richard Malanjum & Co. sums totalling RM12,000. The defendant company/respondent has however failed to adhere to the aforesaid undertaking to settle the claim of the appellant/plaintiff and the balance sum of RM19,390.93 is due and owing.

e And the appellant/plaintiff prays for judgment in the sum of RM19,390.93 together with interest thereon and costs.

f In para. 3 of the statement of defence and counterclaim it is averred that it was an implied term or condition precedent of the said undertaking that the appellant/plaintiff should discontinue the said summons No. 26 of 1989 against the said Datuk Harris bin Mohd. Salleh.

g In para. 4 it is averred in breach of the said implied term or condition precedent the appellant/plaintiff has not discontinued the said summons.

h In para. 5 it is averred that para. 4 of the statement of claim is admitted save that the respondent/defendant says that 2 further payments were remitted to the plaintiff/appellant on 24 May 1989 and 29 June 1989 respectively totalling a sum of RM6,000 and the defendant/respondent will object that all the said payments totalling a sum of RM18,000 were made in respect of a promise the consideration for which has wholly failed.

i In para. 6 it is averred that further or in the alternative on or about 17 March 1989 the respondent/defendant voluntarily promised to the appellant/plaintiff through the appellant's/plaintiff's former solicitor M/s. Richard Malanjum & Co. to pay the appellant/plaintiff the sum of RM31,340.93 by instalments which was then due and owing by the said Datuk Harris bin Mohd. Salleh to the plaintiff/appellant and the defendant/respondent then gave to the appellant/plaintiff the said undertaking in respect of the said sum.

In para. 7 it is averred that by reason of the premises the respondent/defendant says that the alleged sum or account was stated (if at all) in respect of a promise for which there was no consideration.

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And lastly the respondent/defendant counterclaims for the sum of RM18,000.

The notice of application is supported by the affidavit of Irene Benggon Charuruks the general manager of the plaintiff's corporation affirmed on 25 March 1992 (the first affidavit).

b

An affidavit-in-reply was affirmed by Wong Yit Fui, the managing director of the defendant company affirmed on 4 September 1992 (the affidavit-in-opposition).

An affidavit-in-reply was affirmed by the said Irene Benggon Charuruks on 14 October 1992 (the second affidavit).

In para. 5 of the first affidavit it is averred that there were no further payments made after the fourth instalment remitted, leaving a balance of RM19,390 due and owing to the appellant/plaintiff.

c

In para. 6 of the first affidavit it is averred that hence, the plaintiff/appellant through their present solicitors Messrs. Lee & Aziz, in Summons No. MC 72-674-91, commenced action against the defendant/respondent pursuant to the said undertaking and claiming payment of the said balance owing to the plaintiff/appellant.

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In para. 8 of the first affidavit it is averred that the statement of defence and counterclaim affords no reasonable defence to the plaintiff's/appellant's claim, is a sham, filed only to delay and prejudice the claim of the plaintiff/appellant upon the following grounds:

(a) that it was never intended by either the defendant/respondent and or the plaintiff/appellant to provide such condition precedent to the said undertaking; as if it were the case the defendant/respondent should and ought to have obtained the plaintiff's/appellant's compliance thereto, before performing their obligations under the said undertaking, by commencing the instalments as aforesaid.

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(b) that the defendant's/respondent's undertaking was given unequivocally and unconditionally, that there was no mention made whether orally or in writing of conditions to be attached thereto, if at all.

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(c) that the said former solicitors for the plaintiff/appellant upon the plaintiff's/appellant's instructions, had not proceeded on Summons No. 26 of 1989, filed against the said Datuk Harris bin Mohd. Salleh nor was the same pursued after the defendant/respondent commenced payment under the said undertaking. Summons No. 26 of 1989 is exhibited as "IBC1".

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(d) that as the plaintiff/appellant had distrained from pursuing the said Summons No. 26 of 1989 against the said Datuk Harris bin Mohd. Salleh, they have thereby given adequate consideration for the said undertaking of the defendant/respondent.

In para. 9 of the first affidavit it is averred that the counterclaim for the said sum of RM18,000 is in the above circumstances unjustified and totally baseless and ought to be struck out on the following grounds:

h

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- a** (a) In para. 14 thereof, the defendant/respondent alleged that the said sum of RM18,000 was paid in consideration of the plaintiff/appellant, discontinuing the said Summons No. 26 of 1989. In the following para. 15, it was alleged that there being a breach of the implied terms and or condition to the said undertaking, the consideration for the said payment of RM18,000 has therefor wholly failed.
- b** (b) I am advised and I verily believe the foregoing contentions of the defendant/respondent afford no reasonable grounds and or basis of their claim against the plaintiffs, for the reasons as given hereinbefore and contained in para. 8(a) to 8(f) above.

In para. 4.1 of the affidavit-in-opposition it is averred *inter alia*,

- c** (i) the said implied term or condition precedent can be inferred from the plaintiff/appellant solicitors' letter dated 6 April 1990 to the defendant/respondent in which the plaintiff/appellant solicitors wrote that they were instructed to re-institute legal action against the debtor, i.e. the said Datuk Harris bin Mohd. Salleh. A copy of the said letter dated 6 April 1990 is annexed and marked as Exhibit "WYF1".
- (ii) that the said Summons No. 26 of 1989 should be discontinued in consideration of the defendant/respondent undertaking to settle the alleged debt owing by the said Datuk Harris bin Mohd Salleh.
- d** (iii) the fact that the defendant/respondent refused to make further payment of the instalments is well justified as the plaintiff/appellant were in breach of the said implied term when they failed to discontinue the said Summons against the said Datuk Harris bin Mohd. Salleh.

e In para. 4.2 of the affidavit-in-opposition it is averred, *inter alia*,

- (a) The defendant/respondent were never a party to the contract between the plaintiff/appellant and the said Datuk Harris bin Mohd. Salleh from which the alleged debt was incurred. The plaintiff/appellant are therefore required to provide consideration for the defendant's/respondent's undertaking to pay the alleged debt for the said Datuk Harris bin Mohd. Salleh which the defendant/respondent had volunteered.
- f** (b) It was an implied term that the plaintiff/appellant would discontinue the said Summons against the said Datuk Harris bin Mohd. Salleh as consideration for the defendant's/respondent's undertaking and for which the defendant/respondent had paid the plaintiff/appellant a total sum of RM18,000. However, the said payments made in consideration of the plaintiff's/appellant's promise to discontinue the said Summons have wholly failed in that the plaintiff/appellant had not discontinued the said Summons in breach of the said implied term as averred to in paras. 5, 6 and 7 of the defence.
- g** (c) The plaintiff/appellant have therefore failed to provide any consideration for the defendant's/respondent's promise to settle the alleged debt given under the said undertaking.

h In para. 4.3 of the affidavit in opposition it is averred, *inter alia* that:

- (a) It is therefore a triable issue whether the defendant/respondent had made 6 payments totalling RM18,000 or only 4 payments totalling RM12,000. In support of the defendant's/respondent's contention copies of the receipts of payment in respect of the 6 payments made by the defendant/respondent aforesaid are marked as Exhibits "WYF2", "WYF3", "WYF4", "WYF5", "WYF6" and "WYF7" were produced.

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In para. 5 of the affidavit-in-opposition it is averred that the defendant/respondent had duly filed their counterclaim against the plaintiff/appellant in accordance with O. 8 r. 2 of the Subordinate Courts Rules 1980 and not otherwise alleged by the plaintiff/appellant.

In para. 5 of the second affidavit it is averred that:

(a) My corporation had confirmed that there were only 4 (four) payments made by the defendant/respondent in the total sum of RM12,000. It is now shown to me a copy of letter dated 23 October 1989 addressed to my former solicitors, Messrs. Richard Malanjum & Co. explaining the same, produced and exhibited hereto a copy of letter dated 23 February 1990 addressed to the said former solicitors reiterating the above and inquiring the status of the further instalments which were to have been forwarded, produced and exhibited hereto marked "IBC8".

(b) I wish to state further that the 1st. instalment was paid direct to my corporation *vide* the defendant/respondent Sabah Bank Cheque SCB788663 and for which the receipt marked as Exhibit "WYF3" in the defendant's/respondent's affidavit-in-reply was issued. However, the subsequent 2nd, 3rd, and 4th instalments were paid through my former said solicitors, who then issued their receipts and or acknowledgement of receipt of payment given in Exhibits "WYF2", "WYF5" and "WYF7" respectively. In all the aforesaid receipts issued by the said former solicitors the cheque nos. of each payment made is endorsed thereon as follows:

- i) In "WYF2", the Cheque No. was 788706;
- ii) In "WYF5", the Cheque No. was SCB866857;
- iii) In "WYF7", the Cheque No. was SCB961456.

The defendant/respondent had paid the aforementioned instalments *vide* cheques issued out of their account kept with Sabah Bank Berhad.

(c) As for receipts of the corporation marked as exhibits "WYF4" and WYF6" they were issued pursuant to the 2nd and 3rd instalment payments released to the corporation by the said former solicitors. It is now shown to me a copy each of the payment vouchers dated 17 May 1989 and 22 June 1989 respectively, issued for the said release to my corporation by the said former solicitors, exhibited hereto marked "IBC9" and "IBC10" respectively. In "IBC9" the cheque no. endorsed thereon was CKB470048, whereas in "IBC10" the cheque no. endorsed was CKB470272. These cheque nos. were similarly endorsed on "WYF4" and "WYF6" aforementioned. In the circumstances, these could not have been and were indeed never the payments alleged to have been made by the defendant/respondent.

In para. 6 of the second affidavit it is averred for all the payments made by them; one set from the former said solicitors and the other set from my corporation. That by exhibiting both sets of receipts issued therewith the defendant/respondent are attempting to confuse the plain issues of facts of the case, and I am advised and I verily believe is an attempt by them to mislead this Honourable Court and is thereby an abuse of the process of the Court accordingly.

- a** The grounds of appeal as stated in the memorandum of appeal are as follows:
1. The learned Magistrate had erred in law and in fact in holding that there is an issue which ought to be tried namely, whether or not there was consideration given by the appellant to the respondent's undertaking to pay the debt owing to the appellant by one Datuk Harris Mohamed Salleh.
- b** 2. In so deciding the learned Magistrate:
- a) had misdirected himself in fact and in law in holding that by merely allowing Summons No. 26 of 1989, filed against the said Datuk Harris bin Mohamed Salleh to lapse without filing the notice of discontinuance of the action, was an issue triable only at the full trial of the action, as not being tantamount to a forbearance to sue and therefore consideration for the respondents' undertaking to settle the said debt owing
- c** to the appellant.
- b) had misdirected himself in law and in fact, on whether from the correspondence between the parties there could be an inference that it was a condition precedent to the filing of the action herein, that the notice of discontinuance on Summons No. 26 of 1989 be filed beforehand. That this was a further issue that could only be decided
- d** at the full trial of the action.
3. The learned Magistrate had erred in law in fact in holding that there is yet a further issue which ought to be tried on the number of payments made by the respondent to the appellant pursuant to the said undertaking given by them.
 4. That in all the circumstances the findings of the learned Magistrate was against the
- e** whole of the exhibits of the appellant and the weight of the said exhibits.
5. That the learned Magistrate erred in law in failing to take into account the lack of *bona fides* on the part of the respondent in adducing irrelevant and unnecessary documents with the purpose of clouding the plain issues of facts and of the law.
- f** Learned Counsel for the appellant submitted that the appellant has complied with the condition precedent in that the appellant had discontinued Summons No. 26 of 1989 against the said Datuk Harris bin Mohd. Salleh and that the Court should take judicial notice of the fact that this summons was allowed to lapse after its expiry 12 months from the date of its issue. The appellant never proceeded on a new summons against the said Datuk Harris bin Mohd. Salleh.
- g** Therefore learned Counsel for the appellant contended that there was no failure of consideration.
- On the other hand learned Counsel for the respondent submitted that the appellant's failure to prosecute the Summons No. 26 of 1989 against the said Datuk Harris Mohd. Salleh did not constitute any or any lawful consideration.
- h** In p. 86 of the record of appeal the learned Magistrate in his grounds of judgment stated that "However, I am satisfied that under para. 4.1:(b) of defendant's affidavit-in-reply and Exhibit "WYG1" annexed there that there could have been an implied term or condition existing. Exhibit "WYF1" states "... we are instructed to re-institute legal action against the debtor ..." (underlining is mine). "The usage of the word "re-institute" tends to show that there is in existence such implied term.
- i**

I agree then that there is such intention of both plaintiff and defendant that Summons No. 26 of 1989 should be discontinued in consideration of the undertaking on the part of the defendants. It is because of this believe that plaintiff will discontinue the said summons that the defendants commence payments of the instalments.”

a

I agree with the learned Magistrate that the issue as to whether there is an implied term or condition attached to the undertaking that Summons No. 26 of 1989 should be discontinued raises a triable issue.

b

The learned Magistrate was right in holding that whether or not there was consideration given by the appellant for the respondent's undertaking to pay the debt owing by Datuk Harris Mohd. Salleh to the appellant is a triable issue. The learned Magistrate correctly applied the case of *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300 to the foresaid finding.

c

Learned Counsel for the appellant submitted that the appellant had clearly exhibited four instalments payments made by the respondent namely Exhibits “IBC7, “IBC8, “IBC9” and “IBC10”. Learned Counsel for the appellant further contended that the respondent had sought to produce various documents in the form of receipts both from the former solicitors of the appellant as well as the appellant's own receipts which was intended to confuse the plain issues of the appellant's claim.

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I have perused all the documentary exhibits.

Exhibit “IBC3” refers to SCB cheque no. 788663. And exhibit “WYF3” refers to the same SCB cheque no. 788663. Exhibit “WYF3” was issued by the appellant.

Exhibit “IBC4” refers to SCB cheque no. 788706. “IBC4” was issued by the appellant. Exhibit “WYF2” which was issued by Richard Malanjum & Co refers to the same SCB cheque no. 788706.

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Exhibit “IBC5” refers to SCB cheque no. 866857 and exhibit “WYF5” which is issued by Richard Malanjum & Co. refers to the same SCB cheque no. 866857.

Exhibit “IBC6” refers to SCB cheque no. 961456. And exhibit “WYF7” which was issued by Richard Malanjum & Co. refers to the same SCB cheque no. 961456.

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Exhibit “WYF4” which was issued by the appellant refers to CKB cheque no. 470048. And Exhibit “IBC9” which was issued by Richard Malanjum & Co. refers to the same cheque no. 470048.

Exhibit “WYF6” which was issued by the appellant refers to CKBL cheque no. 470272. And Exhibit “IBC10” which was issued by Richard Malanjum & Co. refers to the same CKBL cheque no. 470272.

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From the above it is clear that 6 different cheques were involved and 6 different receipts given by both the appellant and the former solicitors of the appellant. Therefore I agree with the learned Magistrate that the actual number of payments is a triable issue. The appellant's contention is that there were 4 payments made whereas the respondent's contention is that there were 6 payments made.

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I reject the learned Counsel for the appellant's contention that the 6 receipts were intended to confuse the plain issues of the appellant's claim.

The learned Magistrate was correct in deciding that this is not a plain and obvious case for striking out the statement of defence and counterclaim. (See case of *Lee Nyon Choi v. Voon Noon* [1979] 2 MLJ 28).

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a By the words “frivolous and vexatious” are meant cases which are obviously frivolous or vexatious or obviously unsustainable. (Per Lindley LJ in *Attorney General of Duchy of Lancaster v. L. & New Rly* [1892] 3CH 278. The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the Court. (Per Jeane P in *Young v. Holloway* [1895] P87, 90.

b In view of the aforesaid I find that it is certainly arguable that the respondent/ defendant has a reasonable defence and counterclaim, I do not consider the defence is frivolous or vexatious or that it is an abuse of the process of the Court.

I am satisfied that on the pleadings and the affidavits filed there are undoubtedly triable issues both of fact and of law.

c The appeal is therefore dismissed with costs.

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